No. 89-1598

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EASTERN AIRLINES, INC.,
Petitioner,
v.
ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. RESPONDENTS' RELIANCE ON THE ELEVENTH CIRCUIT'S REASONING IS MISPLACED.

A. The Eleventh Circuit's Analysis Is Premised Upon Misconstrued Authorities.

Respondents adopt the Eleventh Circuit's reasoning, found in Section III of the decision, regarding the meaning of "lésion corporelle." However, the Eleventh Circuit's analysis is based primarily on the work of a single commentator. *See* Pet. App. A-14, citing R. Mankiewicz, *The Liability Regime of the International Air Carrier* 145-46 (1981). Mankiewicz' conclusion is, in turn, based upon an incorrectly translated excerpt from a thesis by French commentator, Yvonne Blanc-Dannery, which is completely misleading. Blanc-Dannery wrote:

> . . . L'emploi du terme "lésion" après ceux de mort et de blessure englobe et prévoit les cas de traumatismes ou de perturbations dont les conséquences ne se manifestent pas immédiatement dans l'organisme et dont la corrélation peut être établie avec l'accident.

Y. Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien internationale* 62 (1933). To support his thesis that "lésion corporelle" comprehends recovery for pure mental injury, Mankiewicz translates Blanc-Dannery's *en cas de traumatismes ou de perturbations* to mean "cases of traumatism and nervous troubles," as follows:

> The use of the expression *lésion* after the words "death" and "wounding" encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest in the organism but which can be related to the accident.

Mankiewicz, supra p. 1, at 146. In fact, as the following definition demonstrates, a respected French dictionary defines "perturbations" as a disturbance or aberration in a bodily organ or function:

> Trouble, dérangement dans l'état ou dans la marche naturelle d'une chose. . . . MED Trouble causé dans les fonctions physiologiques par quelque maladie, et, dans la marche d'une maladie, par quelque agent thérapeutique.

Dictionnaire Encyclopédique Quillet 3557 (R. Mortier ed. 1948).[1] As correctly translated, Blanc-Dannery, in fact, stated:

> The use of the term *lésion* after the words *death* and *wounding* encompasses and contemplates cases of

[1] As translated:

> Disturbance, disorder in the condition or in the natural course of a thing. . . . MED Disturbance caused in the physiological functions by illness, and in the course of an illness, by some therapeutic agent.

> trauma or disorder whose consequences do not immediately manifest themselves in the body but which can be related to the accident.

The physiological connotations of the word "perturbation" demonstrate that Blanc-Dannery was primarily concerned with *latent* injury and not with pure mental injury.

B. The Eleventh Circuit Supported Its Conclusion By Authorities Which Are No Longer Good Law.

Moreover, in support of its conclusion, the decision below cites a line of cases premised upon a now discredited rule of law. In *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F.Supp. 1238 (S.D.N.Y. 1975), the court held that the Warsaw Convention did not create a cause of action but merely imposed certain limitations on state law causes of action. 388 F.Supp. at 1252. The court ruled that "mental injury alone should be compensable, if the otherwise applicable substantive law provides an appropriate cause of action." 388 F.Supp. at 1251. At most, therefore, *Husserl* decided that the Convention does not preclude recovery for pure emotional injury if state law permits recovery. *Husserl* was followed in *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322, 1323 (C.D. Cal. 1975); and *Krystal* was followed in *Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971, 977 (S.D.N.Y. 1977) (erroneously stating that the Warsaw Convention does not create cause of action). Since it is now established that the Warsaw Convention is not merely a limitation upon state law causes of action but in fact creates an independent federal cause of action under the treaty, the proper question is whether the Convention itself permits the action.

C. The Eleventh Circuit Misconstrued The French Legal Meaning Of "Lesion Corporelle."

Respondents repeat the Eleventh Circuit's error in arguing that the French legal meaning *governs* the interpretation of the Warsaw Convention. This Court has specifically held that the French legal meaning does *not*

control, but only provides *guidance* regarding the shared expectations of the contracting parties. French law is studied:

> . . . not because "we are forever chained to French law" by the Convention, . . . but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. . . . We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists.

Air France v. Saks, 470 U.S. 392, 399 (1985) (citations omitted).

As demonstrated by Eastern in its initial brief, the Eleventh Circuit ignored the distinct physical connotations of the word "lésion" and erroneously determined that an analogy to the French phrase "dommage corporel" was appropriate. Although "dommage corporel" permits recovery for both economic and non-economic damages, the distinct "lésion corporelle" has a narrower meaning in French which is more appropriately translated into "bodily injury." Contrary to the Eleventh Circuit's conclusion, the treaty drafters' specific rejection of "dommage corporel," which would admit recovery for "dommage matériel" or "dommage moral," and their use of the narrower "lésion corporelle," strongly suggests that they specifically intended to limit air carrier liability to "bodily injury" alone.

II. RESPONDENTS RELY ON A NONEXISTENT PRINCIPLE OF TREATY CONSTRUCTION.

The proposition that treaties could be liberally construed "to accommodate the future," *see* Respondents' Brief at page 16, does not state any principle of treaty construction adopted by the Court. Moreover, this contention, if at all instructive, is only justified when a given interpretation reflects the treaty drafters' intent as evidenced by the subsequent conduct of the contracting

parties. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977). In the instant case, the contracting parties continue to view Article 17 as precluding recovery for pure mental injury. Indeed, that they have refused to amend the Warsaw Convention to achieve what Respondents argue should be achieved by judicial interpretation supports Eastern's argument that pure mental distress is not compensable under the Convention. Petitioner's Brief at pages 25-26.[2]

Moreover, with regard to such subsequent conduct, Respondents overstate the significance of the change in the official English translation of Article 17 from "bodily injury" to "personal injury" found in the unratified Guatemala City Protocol. As fully discussed in Eastern's initial brief, the delegates at the Guatemala City Conference did not even discuss the issue of whether Article 17 supports an action for pure mental injury. Petitioner's Brief at page 28. Therefore, the incidental changes found in a translation of Article 17 and contained in a Protocol that has not been adopted by this or any other nation does not justify Respondents' argument.

Additionally, even if the change in the English translation of Article 17 could support a broader construction of "lésion corporelle" to include pure mental injury, such broader construction must be viewed in the context of the entire package of proposed amendments to the Convention resulting from the Guatemala City conference. A broader construction of "lésion corporelle" could conceivably be balanced by the Protocol's amendment to Article 17 which specifically immunizes air carriers from liability for passenger injury or death which results solely from the health of the passenger. *Shawcross &*

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[2] Respondents' argument that mental distress is *physiological* because it is an injury to the brain is equally unavailing. Mental anguish of the type alleged in the instant case is a purely emotional injury which, in the law, continues to be distinguished from physical injury. Prosser and Keeton, *The Law of Torts* § 54 (W. Keeton 5th ed. 1984).

Beaumont, Air Law at ¶ VII (30) (4th ed. 1988). Such a construction could also be balanced by the unbreakable limit on air carrier liability under the Protocol. *Shawcross & Beaumont, supra* p. 5, at ¶ VII (31). To permit liability for pure mental injury without the limits imposed by the Guatemala City Protocol would ignore the delicate balance of liability envisioned by the political branches in the negotiation of these proposed amendments.[3]

III. THE COURT MUST DECLINE RESPONDENTS' INVITATION TO DECIDE ISSUES NOT RAISED IN THE PLEADINGS IN THIS CASE.

Respondents have not alleged that they suffered any physical injury or physical manifestations of psychic injury. As dictated by the allegations in Respondents' own complaint, *see* J.A. 3-9, this case presents the narrow issue of whether pure mental injury, absent physical injury, is compensable under the Warsaw Convention.[4] Eastern maintains that it is not.

The better rule was articulated in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) and *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1157 (D. N.M. 1973) which held that Article 17 does not permit recovery for pure mental distress absent bodily injury or absent physical manifestations of psychic injury. These decisions focused on Article 17's requirement that damage be "sustained in the event of death or wounding" or of "any other bodily injury suffered by a passenger. . ." Therefore, "mental anguish directly resulting from a bodily injury is damage sustained in the event of a bodily injury." *Burnett*, 368 F.Supp. at 1158. Similarly, "palpable, objective bodily injuries, including those caused by psychic trauma" are compensable. *Rosman*, 34 N.Y.2d at 400, 358 N.Y.S.2d at 110, 314 N.E.2d at 857.[5]

[3] The liability regime established by the Warsaw Convention and the Montreal Agreement provides for absolute carrier liability as a *quid pro quo* for liability limitations. The scheme confers a benefit on passengers by ensuring prompt payment of claims without the need to engage in protracted litigation.

[4] Although the Eleventh Circuit ruled that Respondents Sandy and Gary Dix and Salim and Deborah Khoury could amend their complaint to allege physical injury, *see* Pet. App. A-53-54, the issue before the Court is whether the operative complaint, which alleges only fright and pure emotional injury, states a cause of action under the Warsaw Convention.

IV. RESPONDENTS IMPROPERLY REQUEST THAT THE COURT JUDICIALLY AMEND THE WARSAW CONVENTION IN A MANNER WHICH IS AT ODDS WITH THE DRAFTERS' INTENT.

Respondents invite the Court to ignore the intent of the drafters and the expectations of the parties and judicially amend the Warsaw Convention to conform to what they whimsically view as the better public policy. However, the Court's own decisions regarding proper treaty construction and prudent public policy dictate otherwise.

The potential for frivolous litigation that would be engendered by the Eleventh Circuit's decision is borne out by actual aviation cases. One such case is that of Mr. Michael Schultz, whose claim, although not arising under the Convention, went all the way up to the Seventh Circuit Court of Appeals. As recounted by the court in *Schultz v. American Airlines, Inc.*, 901 F.2d 621 (7th Cir. 1990), Mr. Schultz alleged that the turbulence on an American flight was "so extreme that he was thrown repeatedly against his seat belt and the seat partition causing his spleen to bleed and eventually rupture.

[5] Authorities cited by Respondents that the common law's "impact rule" has been "relaxed" to permit recovery on their claims do not support their argument. *See* Respondents' Brief at page 13. In fact, the *Restatement (Second) of Torts* § 46 (1965) only supports recovery for *intentional* infliction of emotional distress. Section 47 actually *precludes* recovery for emotional distress when the requisite *intent* is lacking. The "impact rule" has not been relaxed to support recovery under the facts of this case. Petitioner's Brief at page 31. *See Prosser and Keeton, supra* p. 5 n.2, at 361 (suggesting, as Eastern maintains, that claims for mental injury require a showing of "definite physical symptoms").

. . ." 901 F.2d at 622. He stated that his seat belt was the only thing which prevented him from being thrown against the ceiling and across the plane. 901 F.2d at 622-23. Every other witness testified that the flight was uneventful and one witness even testified that he "enjoyed the flight very much." The court held that Mr. Schultz had failed to establish his claim. 901 F.2d at 622-23.

The Eleventh Circuit's decision creates a cause of action for a purely subjective and undemonstrable injury which is untempered by the traditional safeguards surrounding an action for pure emotional distress. Under the Warsaw Convention and the Montreal Agreement, air carriers are absolutely liable for passenger "bodily injury" arising out of an "accident" in international transportation. Contrary to Respondents' contention, there is nothing in the Convention's scheme which would enable a court to sort out the trivial from the genuine claims. Respondents' claim that aircraft accidents are "likely to cause severe and genuine fright or mental distress" is not supported by even the facts of this case. Out of all the passengers on board the subject flight, only 26 brought actions alleging severe fright or emotional distress. Moreover, a jury hearing an unreported companion case arising from the same incident found that one passenger suffered no damage at all. *Crespo v. Eastern Airlines, Inc.*, No. 84-0502-Civ-Davis (S.D. Fla. Nov. 3, 1987) (jury verdict of zero damages).[6] Far from being "hyperbolic," Eastern's argument reflects the traditional caution surrounding claims for pure mental injury.[7]

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[6] In *Crespo*, liability was admitted and the only issue was whether the passenger had suffered any damage.

[7] Eastern cannot permit Respondents' glaring inaccuracies and overstatements of law and fact to go uncorrected. First, contrary to Respondents' representation, the Eleventh Circuit did *not* hold that Eastern's conduct, with respect to the subject flight, supports a finding of willful misconduct. The court expressly left that determination for the trial court. Pet. App. A-51-52. Subsequently, the Florida Supreme Court, in a companion case, held that the allegations in Respondents' complaint failed to establish such willful misconduct. *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990), *reprinted in* Pet. App. C.

Moreover, in their brief, Respondents attempt to change the nature of their own allegations. The allegations in the complaint were that Eastern had failed to take "appropriate" measures, and *not* that Eastern "had done nothing" to correct the alleged problems.

Additionally, Respondents improperly attempt to transform their legal argument into an evidentiary proceeding regarding Eastern's conduct. References to the autobiography of former Eastern President, Frank Borman, are not part of the record and, therefore, must be wholly disregarded. Moreover, the book's generalized comments do not establish that the accident, in the instant case, was specifically caused by any failure in Eastern's management policies.

Another misrepresentation is Respondents' assertion that Article 25 "removes all 'conditions and limits' " of the Convention if willful misconduct is proven. In fact, the courts have consistently held that the only "conditions and limits" which are removed in cases of willful misconduct are those found in Article 22, which limit air carrier liability to certain monetary maximums. *See e.g., Highlands Ins. Co. v. Trinidad and Tobago (BWIA Int'l) Airways Corp.*, 739 F.2d 536, 539 (11th Cir. 1984) (delegates to conference resulting in Hague Protocol understood that Article 25 referred *only* to liability caps of Article 22).

V. THE ISSUE OF THE WARSAW CONVENTION'S EXCLUSIVITY WAS RAISED IN THE PETITION FOR WRIT OF CERTIORARI AND IS FAIRLY INCLUDED WITHIN THE ARTCLE 17 ISSUE RAISED HEREIN.

Eastern objects to Respondents' specious charge that it has "smuggled" the exclusivity question into this case. Respondents' Brief at page 19. The question of the Warsaw Convention's exclusivity was openly presented in its Petition for Writ of Certiorari and fully opposed by Respondents' in their Brief in Opposition. Petition at pages 16-18; Respondents' Brief at pages 10-11. Under the Court's own rules, questions set forth in the *petition*, or fairly included therein, will be considered. Sup. Ct. R. 14.1(a); *Irvine v. People of State of California*, 347 U.S. 128, 129, *reh'g denied*, 347 U.S. 931 (1954) (court will not consider questions not raised in the *petition* for writ of certiorari).

Moreover, the question of the Warsaw Convention's exclusivity is fairly included within the question of whether pure mental injury is compensable. Courts which have read Article 17 broadly have often done so out of a specific concern that damages not comprehended by the Convention may give rise to state-created causes of action not subject to any of the Convention's conditions or limits. *See Floyd*, Pet. App. A-31 (stating that if Article 17 does not encompass emotional trauma, plaintiffs might be able to pursue state law cause of action for intentional infliction of emotional distress); *Husserl*, 388 F.Supp. at 1246-47 (same). Therefore, by demonstrating that the Warsaw Convention is the exclusive source of air carrier liability for damage claims arising out of an accident in international air transportation, Eastern hopes to eliminate what may have compelled the Eleventh Circuit's strained construction of Article 17.[8]

VI. THE WARSAW CONVENTION IS THE UNIVERSAL SOURCE OF AIR CARRIER LIABILITY FOR PASSENGER DEATH OR INJURY RESULTING FROM AN ACCIDENT IN INTERNATIONAL AIR TRANSPORTATION.

The Supremacy Clause of the United States Constitution provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitu-

[8] There is conflict among the circuits on the exclusivity of the Warsaw Convention. *Compare In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) (federal cause of action not exclusive) *and Tokio Marine and Fire Ins. Co., Ltd. v. McDonnell Douglas Corp.*, 617 F.2d 936, 941-42 (2d Cir. 1980) (same) *with Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 458-60 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985) (federal cause of action exclusive); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (Convention provides universal source of a right of action).

tion or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI. Therefore, any state law in conflict with a treaty of the United States is invalid. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157-58 (1978). Moreover, even consistent state laws are preempted if federal law evinces the intent to completely preempt or occupy the field. *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

Complete preemption may be expressly stated or implicitly evident in a given federal law or treaty. *Jones v. Rath Packing Co.*, 430 U.S. 519, *reh'g denied*, 431 U.S. 925 (1977); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 185 (3d Cir. 1986). Complete preemption is implicit when (1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for states to supplement it, (2) when federal law touches a field of dominant federal interest leaving no room for state role, or (3) when a multiplicity of state-created substantive rules of law and procedure threaten the federally declared objective of national uniformity. *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 502, 504, 509, *reh'g denied*, 351 U.S. 934 (1956). Moreover, complete preemption occurs when the application of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (state law preempted where it stands as an obstacle to the accomplishments of federal objective); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (same).[9]

[9] By premising their exclusivity argument on the case *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986), the Respondents have framed the exclusivity issue in the narrow *"defensive preemption"* context of removal cases and have distorted the applicable preemption analysis. If, as Respondents suggest, the preemption analysis in removal cases has focused on whether Congress has so pervasively regulated an area that it could be inferred that

Although it was earlier in some doubt, it is now established that the Warsaw Convention creates a cause of action for passenger damage claims arising out of an accident occurring in international air transportation. *Floyd*, Pet. App. A-9; *In re Mexico City Aircrash*, 708 F.2d at 400; *Benjamins*, 572 F.2d at 913. Respondents would argue that, if Article 17 does not permit recovery for pure mental distress, a plaintiff should be able to go outside of the Warsaw Convention and bring a cause of action against an air carrier based on state law. However, the purpose of the cause of action created by the Convention is to provide for uniform liability rules for passenger damage claims. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256, *reh'g denied*, 467 U.S. 1231 (1984). When uniformity of law is a matter of federal interest, a federal scheme will occupy the field and completely preempt state statutory schemes which provide a multiplicity of differing substantive rules resulting in conflicting and inconsistent adjudications. *Nelson*, 350 U.S. at 502, 504, 509. For example, in holding that state anti-sedition legislation was completely preempted by federal law, the Court in *Nelson* held that the federal interest in substantive uniformity of law precluded the enforcement of the various state laws on the subject:

> A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.
>
> Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement

it intended for federal law to completely preempt or occupy the given field, such a test is narrower than the proper Supremacy Clause analysis applicable to this nonremoval case.

As discussed *supra*, in addition to the pervasiveness of a given regulatory scheme, complete preemption may also be inferred, *inter alia*, from the explicit language of a federal law, from its legislative history, or from the federal goal of national uniformity of substantive result.

> would encounter not only the difficulties mentioned by Mr. Justice Jackson, but the added conflict engendered by different criteria of substantive offenses.

350 U.S. at 509, citing *Garner v. Teamsters, Chauffers and Helpers Local Union No. 776 (A.F.L.)*, 346 U.S. 485, 490-91 (1953).[10] Here, the federal interest of uniformity would be destroyed without compliance with the drafters' desire that the Convention be exclusively applied. To allow a multiplicity of substantive results would completely obviate the purpose and objectives of the Convention. It is precisely for this reason that the framers intentionally left little room for individual states to maneuver. Permitting passenger recourse to state law causes of action for damage claims arising out of an accident in international air transportation therefore impermissibly conflicts with and stands as an obstacle to the Warsaw Convention's goals. *Butler v. Aeromexico*, 774 F.2d 429, 431 (11th Cir. 1985) (state law preempted when it conflicts with tenor of Warsaw Convention); *Boehringer-Mannheim*, 737 F.2d at 459 (Warsaw Convention is exclusive and preempts state law to ensure uniformity intended by drafters); *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3d Cir. 1984), *cert. denied*, 470

[10] The federal interest in substantive uniformity has led to complete preemption of state tort law in analogous federal schemes. For example, the Federal Employers' Liability Act (F.E.L.A.) § 1 *et seq.*, 45 U.S.C. § 51 *et seq.* (1939), supplies the exclusive remedy to employees of railway carriers injured while engaged in the furtherance of interstate and foreign commerce. *Lindgren v. United States*, 281 U.S. 38, 45 (1930) (it is well-settled that "since Congress by the Federal Employers' Liability Act took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws on the subject are superseded.")

Similarly, the Jones Act, 46 U.S.C. § 688 (1920), extends F.E.L.A.'s applicability to seamen injured in the course of their employment. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 155 (1964). Because of the federal interest in substantive uniformity, the Jones Act also completely preempts state law. *Gillespie*, 379 U.S. at 154 (Jones Act provides "exclusive right of action . . ., superseding all state death statutes which might otherwise be applied to maritime deaths").

U.S. 1059, *reh'g denied*, 471 U.S. 1112 (1985) (implying that Convention is exclusive and preclusive where there is an archetypical "accident" to which Convention's liability limits specifically apply); *Highlands*, 739 F.2d at 536 n.2 (Warsaw Convention exclusive for claims arising out of international air transportation); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1311 n.8 (9th Cir. 1982) (Warsaw Convention preclusive of state law which conflicts with federal scheme and circumvents liability limits); *Benjamins*, 572 F.2d at 919 (uniformity in international air law can best be recognized by holding that Convention is universal source of a right of action); *Jahanger v. Purolator Sky Courier*, 615 F.Supp. 29 (E.D. Pa. 1985) (Convention is exclusive as to claims arising out of international air transportation); *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845, *reh'g denied*, 464 U.S. 978 (1983) ("Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation" and liability limitation would have no meaning if plaintiffs could assert independent state law causes of action).

Cases which hold that the Warsaw Convention is not exclusive are unpersuasive because they are either erroneously premised on the view that the Convention does not create a cause of action but only sets conditions and limits on state-created causes of action, *see Halmos v. Pan American World Airways, Inc.*, 727 F.Supp. 122, 123 (S.D.N.Y. 1989); *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), or address the exclusivity issue in dicta which is at most incidental to their determination of a wholly unrelated Warsaw Convention issue. *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 723 (9th Cir. 1987) (dicta that state law claims are subject to Convention's limits incidental to holding that human remains constitute "*goods*" under Convention); *In re Mexico City Aircrash*, 708 F.2d at 413 n.24 (dicta regarding non-exclusivity incidental to holding that Convention creates right of action); *Tokio Marine*, 617 F.2d at 942 (dicta relating to non-exclusivity incidental to discussion of whether action under Convention is contractual or tortious in nature for application of indemnity rule).

Moreover, in the instant case, the treaty drafters expressly intended that the Warsaw Convention supply the governing substantive law, precluding recourse to national (that is, local) law. The Convention seeks to regulate "in a uniform manner the . . . *liability* of the air carrier." Warsaw Convention, Preamble (emphasis added). Additionally, Petitioner's Brief at pages 35-38 contains numerous references to framers' comments that recourse to parochial national law be avoided. Moreover, the language of the Convention itself is instructive as to the framers' intent that it be the exclusive cause of action for all international air travel. *See* Warsaw Convention, Article 1 ("This Convention applies to *all* international transportation. . . .") (emphasis added). That the Convention expressly preempts state tort law is also evident from Article 17 which holds the air carrier liable for *any* bodily injury suffered by a passenger.

Complete preemption is further evident in the pervasiveness of the Convention's scheme with regard to air carrier liability. This Court has upheld complete preemption where "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Nelson*, 350 U.S. at 502. Manifestly, the Convention is replete with detailed references to the elements of a cause of action. *See* Articles 1 (when Convention applies); 17 and 18 (compensable injuries and losses); 20 (contributory negligence); 22 (liability limits); 24 (Convention sets forth exclusive liability rules for cause of action); 25 (willful misconduct and vicarious liability); 27 (wrongful death action on decedent's estate); 28 (subject mat-

ter jurisdiction and procedure); 29 (statute of limitations); 30 (joint and several liability, successive carriers); and 32 (arbitration of claims). Even a superficial reading of the Convention undeniably demonstrates the Convention's pervasive regulation.

Additionally, the Convention is an international treaty. The federal power over the field of foreign affairs is exclusive and state law, being confined to its narrowest limitation, cannot *add to* or take away from a treaty or federal law touching upon that class of laws which concern this nation's relations with other nations or governments. *Hines*, 312 U.S. at 62-63, 66-68.

The now discredited view that the Warsaw Convention does not create a cause of action but merely sets conditions and limits to state-created causes of action is echoed in the distinction drawn by the court in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D. Fla. 1986), quoted extensively in Respondents' argument. The plaintiff in *Rhymes* brought an action under Florida's wrongful death law arising out of precisely the type of accident in international air transportation for which the Convention was intended to supply uniform rules. The *Rhymes* decision holds that the Warsaw Convention provides the exclusive *remedy* but not the exclusive *cause of action*. Under *Rhymes*, a plaintiff may, presumably, base his cause of action on either the Convention or on state law, however, any recovery is subject to the Convention's conditions and limitations and conflicting provisions of state law are preempted. However, the *Rhymes* holding that the Convention only preempts conflicting state law wholly begs the question of whether the desired uniformity of air carrier liability can be achieved if plaintiffs in the fifty states can assert state tort claims outside of and substantively different from the cause of action for injury created by Article 17 of the Warsaw Convention.

Recently, another federal judge in the very same Southern District of Florida disagreed with *Rhymes* and

held that the terms of the Warsaw Convention mandate a finding of exclusivity. *Velasquez v. Aerovias Nacionales de Colombia*, —— F.Supp. ——, Nos. 90-1564, 90-1565, slip op. (S.D. Fla. Aug. 28, 1990) (available on Westlaw, 1990 WL 133196), *reprinted in* Reply App. A. *Velasquez* involved an airplane accident where many passengers were killed. The flight originated in Bogotá, Colombia and was destined for New York, New York. The case was filed in state court and removed to the Southern District of Florida. Because the complaints for wrongful death did not mention the Warsaw Convention, the court was faced with whether the action was properly removable.

In its memorandum opinion, the *Velasquez* court conducted an extensive analysis of the terms and purposes of the Convention and of the framers' repeated expressions of preemptive intent and stated:

> Courts and commentators alike are in agreement that the Warsaw Convention had two primary objectives. The first objective was to place a limitation on the potential liability of the airliners [sic] in the event of accidents and lost or damaged goods. *Minutes*,[11] at 37; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984); Andreas F. Lowenfeld and Allan I. Mendelsohn, "The United States and the Warsaw Convention," 80 *Harv. L. Rev.* 497, 498-99 (1967) ("Lowenfeld and Mendelsohn"). The second objective was to establish a uniform system for handling claims arising out of international air transportation. *Minutes*, at 85, 87. The case authority discussing the delegates' desire to achieve such uniformity is abundant.
>
> The delegates' desire to establish an exclusive and uniform liability system in the context of interna-

[11] *Minutes, Second International Conference on Private Aeronautical Law*, October 4-12, 1929, Warsaw (R. Horner & D. Legrez trans. 1975).

tional air travel is vividly illustrated by the following statements:

> *Mr. Ambrosini (Italy)*: We wish that the Convention be applied in all cases, and it is for this reason that I proposed the formula which we have adopted; naturally, one can find something more precise, but it's a question for the drafting committee. In any case, *recourse to national law must be ruled out.* (emphasis supplied).
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> *Mr. Ripert (France)*: We will do our best to find the formula which will be satisfactory, but it is agreed that from this point on, *we are absolutely opposed to a formula that would lead to the application of national law.* It's the first time that application of national law is required, and if it were allowed for this question, it would be required for others. From our point of view, one would thus arrive in destroying the Convention, if one establishes recourse to national law upon each article. (emphasis supplied).
>
> We will be as conciliatory as possible on the formula to be adopted; we will develop it as much as possible, but I beg the delegates not to enter upon this dangerous course which would consist in reserving the result of the litigation to national law.

Minutes, at 65-66. Whatever the validity of these objectives today, uniformity and limitation of liability certainly remain integral features of the Warsaw Convention. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d [1462] at 1468 [11th Cir. 1989]. Our decision today seeks to carry out the objectives and spirit of the Warsaw regime.

Velasquez, —— F.Supp. at ——, Reply App. at A-7-9 (footnote omitted).[12]

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[12] Respondents cite Article 24 in support of their position that the Warsaw Convention was only intended to set conditions and limits to locally created causes of action. However, the drafters considered Article 24 to be "the very substance of the Convention, because it excludes recourse to common law" for a cause of action against the carrier. *Minutes*, *supra* p. 17, at 213 (statement of British delegate Sir Alfred Dennis). *See Benjamins*, 572 F.2d at 918 ("however founded" language of Article 24 may have been intended to refer to a number of possible "factual" bases for envisioned action) (emphasis added).

Respondents' sole reliance upon *Rhymes*, one district court case which is based upon a faulty premise and has been criticized by another court in the very same district, demonstrates its lack of validity. Because neither uniformity nor liability limitation can be achieved by permitting recourse to the myriad state law causes of action for claims arising out of an accident in international air transportation, the Court should conclude that the Warsaw Convention is the exclusive source of a right of action for such claims.

Respondents' other references to the Convention's *Minutes* are either taken out of context or unsupportive of their own arguments. For example, the fact that the Yugoslav delegation ignored national law and instead suggested that another international treaty, the Bern Convention, supply supplemental rules to the Warsaw Convention, only proves the fact that the framers intended to establish one international body of uniform supplementary law and did not consider the various laws of the many nations to be appropriate supplements to the Warsaw Convention.

Additionally, the Respondents' discussion of "friendly" or gratuitous carriage does not support their conclusion since such carriage is specifically provided for in Article 1 of the Convention. This is yet another example of the Convention's comprehensiveness.

Respondents' references to other portions of the *Minutes*, *see* Respondents' Brief at pages 35-38, are taken out of context. The delegates' discussion of the Convention's inapplicability was narrowly focused on incidents which do not occur during or arise out of *international carriage* under the Convention. Nor does the word "certain" evince non-exclusivity. The Warsaw Convention expressly applies to "*all* international transportation of baggage, or goods performed by aircraft. . . ." Warsaw Convention, Article 1 (emphasis added). The word "certain" therefore cannot but encompass those "certain rules" relating to air carrier liability for that entire category of claims arising out of *international air transportation.*

CONCLUSION

For the foregoing reasons, Eastern respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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October 1990

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 90-1564-CIV-SCOTT
90-1565-CIV-SCOTT

LUIS FERNANDO VELASQUEZ, as Personal Representative of the Estate of MARIA CECILIA VELASQUEZ, Deceased, and on behalf of JAIME VELASQUEZ, and GUIDO JESUS VELASQUEZ,

Plaintiff,

v.

AEROVIAS NACIONALES DE COLOMBIA, S. A., AVIANCA INC., and COMMODORE AVIATION, INC.,

Defendants.

LUIS FERNANDO VELASQUEZ, as Personal Representative of the Estate of MARIO VELASQUEZ, Deceased, and on behalf of LUIS FERNANDO VELASQUEZ, JAIME VELASQUEZ and GUIDO JESUS VELASQUEZ,

Plaintiff,

v.

AEROVIAS NACIONALES DE COLOMBIA, S. A., AVIANCA INC., and COMMODORE AVIATION, INC.,

Defendants.

MEMORANDUM OPINION

[Filed Aug. 28, 1990]

These actions arise out of a tragic airplane accident which occurred in Cove Neck, New York, on January 25,

1990.[1] As a result of this unfortunate event, the Court is presented with its first opportunity to consider whether the Warsaw Convention, 49 Stat. 3000, reprinted at 49 U.S.C. 1502 (1976)[2] provides the exclusive cause of action for the victims of an international air disaster. Having exhaustively reviewed the record and applicable legal authority, as well as having conducted a hearing on this matter, the Court now renders the following memorandum opinion.[3]

I. FACTUAL BACKGROUND

On January 25, 1990, Avianca Flight 52 departed from Medellin, Colombia.[4] Shortly before its scheduled arrival at John F. Kennedy Airport, Flight 52 crashed in Cove Neck, New York, at approximately 9:30 p.m. As a result of this air disaster, sixty-five passengers were killed and eighty-four passengers were severely injured. As is often the case in accidents of this magnitude, a vast amount of litigation has been initiated in multiple jurisdictions.

As of the date of this Order, forty-three death and personal injury actions have been filed against the defend-

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[1] By Order dated July 25, 1990, the Court consolidated the above-captioned causes of action for the limited purpose of considering the motions for remand filed in each case.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C. note following section 1502. We shall refer to this international treaty by its more popular, and less cumbersome name, the Warsaw Convention.

[3] In addition to counsel of record, Attorney Victor Dias, Jr. of the Podhurst, Orseck law firm appeared, *amicus curiae*, at the August 3, 1990, hearing on behalf of the plaintiffs. The Court has given due consideration to the excellent *amicus curiae* brief.

[4] Flight 52 which originated in Bogota, Colombia, made its first scheduled stop in Medellin, Colombia. From Medellin, the flight was to travel to John F. Kennedy Airport in New York, New York.

ants Aerovias Nacionales de Colombia, S.A., Avianca Incorporated, and Commodore Aviation Incorporated (collectively "AVIANCA"). Of these pending actions, five were filed in the Circuit Court in and for Dade County, Florida.[5] The two actions under present consideration were filed by Luis Fernando Velasquez, the personal representative of the estates of Maria Cecilia Velasquez and Mario Velasquez. Velasquez has grounded each of these actions strictly in terms of Florida's Wrongful Death Act. *See*, Florida Statute, sections 768.16-768.27. In each of the complaints, Velasquez has carefully avoided making the slightest reference to a federal cause of action.

Shortly after these actions were commenced in state court, Avianca sought removal pursuant to 28 U.S.C. 1441, to the United States District Court for the Southern District of Florida. The following represents a compilation of the actions sought to be removed:

1. *Luis Julio Cedial, et al. v. Aerovias Nacionales de Colombia, S.A., Avianca, Inc. and Commodore Aviation Inc.*, 90-1515-Civ-Ryskamp.

2. *Jesus E. Calderon, et al. v. Aerovias Nacionales de Colombia, S.A., Avianca, Inc. and Commodore Aviation Inc.*, 90-1045-Civ-Aronovitz.

3. *Luis Fernando Velasquez, et al. v. Aerovias Nacionales de Colombia, S.A., Avianca Inc. and Commodore Aviation Inc.*, 90-1564-Civ-Scott.

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[5] The remaining actions have been filed in the United States District Courts in and for the Eastern and Southern Districts of New York. By Order dated June 14, 1990, the Judicial Panel on Multidistrict Litigation transferred these actions to the Eastern District of New York for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. 1407.

4. *Luis Fernando Velasquez, et al. v. Aerovias Nacionales de Colombia, S.A. Avianca, Inc. and Commodore Aviation Inc.*, 90-1565-Civ-Scott.[6]

In essence, Avianca asserts that these actions are properly removed to federal court as a result of the exclusivity of the Warsaw Convention—that is, the Warsaw Convention provides *the sole cause of action* under which the victim of an international air disaster may proceed. Conversely, the plaintiffs allege that the Warsaw Convention merely provides *the exclusive remedy* for such victims—that is, it does not prescribe the exclusive cause of action.[7] Fully cognizant of the depth of emotion that such tragedies naturally invoke, we now proceed to consider the legal basis of plaintiff's motion for remand.

II. LEGAL ANALYSIS

The actions under consideration present difficult questions regarding interpretation of the Warsaw Convention. These questions have come to fruition as a result of Avianca seeking removal of these actions to federal court pursuant to 28 U.S.C. section 1441.[8] To properly address

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[6] The fifth case filed in the Circuit Court in and for Dade County, Florida, which Avianca has not sought to remove to federal court is: *Jose Daniel Telles et al. v. Aerovias Nacionales De Colombia, S.A., Avianca Inc., and Commodore Aviation, Inc.*, 90-27476. Removal was not sought as this case involves the death of a crew member aboard Avianca flight 52.

[7] By Order dated May 23, 1990, Judge Aronovitz, relying exclusively upon Chief Judge James Lawrence King's decision in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D. Fla. 1986), granted plaintiff's motion to remand filed in Case No. 90-1045. However, in his Order, Judge Aronovitz did recognize authority holding to the contrary.

[8] This statutory provision provides in pertinent part as follows:

Section 1441, Actions removal generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

the questions that have arisen, it is essential that the Court consider, at the outset, the history and intent behind the Warsaw Convention.

(A). History Of The Warsaw Convention

The Warsaw Convention is an international treaty to which both Colombia and the United States are signatories. In fact, most of the major countries of the world whose airlines have international routes have chosen to adhere to the terms of this treaty. *See*, Lee S. Kreindler, 1 Aviation Accident Law section 11.01[3] at 11-7 (1988) (listing those countries which are signatories of the Warsaw Convention); Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook*, (1988); *In Re Aircrash In Bali, Indonesia On April 22 1974*, 684 F.2d 1301 (9th Cir. 1982). The Warsaw Convention was the result of two international conferences held in Paris, France in 1925 and Warsaw, Poland in 1929. The United States declined an invitation to participate in the drafting of the Convention. However, the United States did appoint two representatives, John Ide and McCeney Warlich, to observe the proceedings. Following ratification by several countries, the United States eventually pronounced its adherence to the Warsaw Convention in 1934. On June 15, 1934, the Senate approved the Convention by voice vote. 78 Cong. Rec. 11,582 (1934); *see*, Lowenfeld and Mendelsohn, 80 *Harv. L. Rev.* at 502.

From the outset, the Warsaw Convention provoked a great deal of debate and dissatisfaction among the majority of signatory countries, including the United States. *See*, Lowenfeld and Mendelsohn, 80 *Harv. L. Rev.* at 502. Especially bothersome was the limitation on liability set forth in Article 22 of the Convention. In an effort to eradicate this dissatisfaction, the signatories to the Convention met at the Hague in 1955. This meeting, known as the Hague Protocol, had the effect of increasing the limitation of liability to approximately $16,600 in American currency.[9] *Hague Protocol Art. XI*, reprinted in Andreas F. Lowenfeld, *Aviation Law Documents Supp.* 958-59 (2d Ed. 1981). Eleven years later the Montreal Agreement was enacted.[10] This Agreement increased the limitation on liability to $75,000 in American currency. Since the time of Montreal, additional international conferences have been convened in attempt to revise the terms of the Warsaw Convention. However, the United States has chosen to abide by the Warsaw Convention, as modified by the Montreal Agreement. *See, Floyd v. Eastern Airlines, Inc.*, 872 F.2d at 1469; Stuart M. Speiser and Charles F. Krause, 1 *Aviation Tort Law* section 11.20 at 680-83 (1978 and 1988 Supp.).

At the time the Warsaw Convention was convened in October 1929, commercial air travel was in its infancy.[11]

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[9] The United States has never adhered to the Hague Protocol.

[10] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. E-28680, May 13, 1966, 31 Fed.Reg. 7302 (1966).

[11] "The total airline operations in the five-year period 1925-1929 —domestic as well as foreign travel—were only 400 million passenger miles. The fatality rate was 45 per 100 million passenger miles. This compares with the rate of 0.55 fatalities per 100 million passenger miles in 1965. 1965 Annual Report of the ICAO Council to the ICAO Assembly 13. The larger airlines could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircraft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 500 miles. . . ." Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention," 80 *Harv. L. Rev.* 497, 498 (1967).

In fact, Charles Lindbergh had flown "The Spirit of St. Louis" across the Atlantic Ocean only two years before in 1927. The sole international airliner conducting business in the United States at that time operated flights between Havana, Cuba and Key West, Florida. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967); Wright, "The Warsaw Convention's Damage Limitations," 1957 *Clev.-Mar. L. Rev.* 290-91. Although commercial air travel was just a burgeoning industry at though commercial air travel was just a burgeoning industry at this time, "[c]ommon rules to regulate international air carriage [h]ad become a necessity." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989); *Minutes*, "Second International Conference on Private Aeronautical Law," October 4-12, 1929, Warsaw 13 (English translation by Robert C. Horner and Didier Legres 1975) ("Minutes") (address of Mr. Lutostanski, head of the Polish delegation). As a result of such necessity, the Warsaw Convention was adopted.

Courts and commentators alike are in agreement that the Warsaw Convention had two primary objectives. The first objective was to place a limitation on the potential liability of the airliners in the event of accidents and lost or damaged goods. *Minutes*, at 37; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984); Andreas F. Lowenfeld and Allan I. Mendelsohn, "The United States and the Warsaw Convention," 80 *Harv. L. Rev.* 497, 498-99 (1967) ("Lowenfeld and Mendelsohn"). The second objective was to establish a uniform system for handling claims arising out of international air transportation. *Minutes*,

at 85, 87. The case authority discussing the delegates' desire to achieve such uniformity is abundant.[12]

The delegates' desire to establish an exclusive and uniform liability system in the context of international air travel is vividly illustrated by the following statements:

> *Mr. Ambrosini* (*Italy*): We wish that the Convention be applied in all cases, and it is for this reason that I proposed the formula which we have adopted; naturally, one can find something more precise, but it's a question for the drafting committee. In any case, *recourse to national law must be ruled out.* (emphasis supplied).
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> *Mr. Ripert* (*France*): We will do our best to find the formula which will be satisfactory, but it is agreed that from this point on, *we are absolutely opposed to a formula that would lead to the application of national law.* It's the first time that application of national law is required, and if it were allowed for this question, it would be required for others. From our point of view, one would thus arrive in destroying the Convention, if one establishes recourse to national law upon each article. (emphasis supplied).
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> We will be as conciliatory as possible on the formula to be adopted; we will develop it as much as possible, but I beg the delegates not to enter upon this dangerous course which would consist in reserving the result of the litigation to national law.

Minutes, at 65-66.

Whatever the validity of these objectives today,[13] uniformity and limitation of liablity certainly remain integral features of the Warsaw Convention. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d at 1468. Our decision today seeks to carry out the objectives and spirit of the Warsaw regime.

(B). Does The Warsaw Convention Create A Cause Of Action

Prior to considering the exclusivity of the Warsaw Convention, the Court must first determine whether the Convention creates a cause of action for death and personal injury actions. Immediately following enactment of the Convention, many of the courts and commentators that considered this question acknowledged the creation of a cause of action thereunder. *See, Salamon Koninklijke Luchtvaart Maatschappij, N.Y.*, 107 N.Y.S.2d 768 (Sup.Ct. 1951), *aff'd mem*, 281 App.Div. 965, 120 N.Y.S.

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[12] *Reed v. Wiser*, 555 F.2d 1079, 1090 (2nd Cir.) cert. denied, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977) ("[A] fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish *a uniform body of world-wide liability rules* to govern international aviation, which would supersede with respect to international flights the scores of different domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved") (emphasis supplied); *Benjamins v. British European Airways*, 572 F.2d 913 (2nd Cir. 1978); *In Re Aircrash In Bali, Indonesia On April 22, 1974*, 684 F.2d at 1304-1305; *Boehringer-Mannheim Diagnostics v. Pan Am World*, 737 F.2d 456 (5th Cir. 1984); *Harpalani v. Air India, Inc.*, 622 F. Supp. 69 (D.C. Ill. 1985); *St. Paul Ins. Co. v. Venezuelan Intern. Airways*, 807 F.2d 1543 (11th Cir. 1987); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989); *Eggink v. Trans World Airlines, Inc.*, No. 87-3403 (S.D.N.Y. 1990) (available on Lexis July 27, 1990) ("A central purpose of the Convention is to promote international air travel and transport by establishing uniformity with respect to the liability of carriers").

[13] *See*, Kreindler, 1 *Aviation Accident Law* section 11.01[6] at 11-13; *Comment*, "Warsaw Convention Liability Limitations: Constitutional Issues, 6 Nw. J. Int'l. L. & Bus. 896 (1984); *Comment*, "The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention," 48 J. Air L. & Com. 805 (1983).

2d 917 (1st Dept. 1953); Lowenfeld and Mendelsohn, 80 *Harv. L. Rev.* at 517.

This consensus of judicial construction, however, was shortlived. In the mid-1950's the Second Circuit handed down two seminal opinions in which it was concluded that the Convention failed to create a cause of action. *Komlos v. Compagnie Nationale Air France*, 209 F.2d 436 (2nd Cir.), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed.2d 646 (1954); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2nd Cir.) *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957). Thereafter, for over two decades, these two decisions were followed by courts throughout the country. *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258, n.2 (9th Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 262 (1957).

In 1978, however, the Second Circuit was presented with the opportunity to reconsider the logic it previously employed in deciding the *Komlos* and *Noel* cases. On this occasion, giving great deference to the objective of the Warsaw regime, the Second Circuit reversed its prior reasoning by recognizing a cause of action for death and personal injury actions. *Benjamins v. British European Airways*, 572 F.2d 913 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979). Other circuits soon adopted this analysis. *See, Boehringer-Manheim Diagnostics, Inc., v. Pan American World Airways, Inc.*, 737 F.2d at 458; *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1776, 94 L.Ed.2d 895 (1985), *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 n.5 (7th Cir. 1989); *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir.1983). In *Floyd v. Eastern Airlines, Inc.*, the Eleventh Circuit, presented with an opportunity to consider this question, concluded that the Warsaw Convention does create a cause of action in personal injury and death cases. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d at 1470.[14] Thus, although this issue has been the subject of somewhat inconsistent analysis during the course of its development, it has been squarely addressed and resolved within this circuit.

(C). Is The Cause Of Action Created By The Warsaw Convention Exclusive

Having determined that the Warsaw Convention creates a cause of action, we now turn to the more difficult question of whether such an action is exclusive to the victims of international air disasters. This question is of great importance to aviation litigation and is considered by this Court for the first time. Given the progression of the case authority, as well as the overriding objective of the Convention to establish a uniform system of liability, we are compelled to hold that the Warsaw Convention provides the exclusive cause of action in cases such as this.[15]

The exclusive nature of the Convention is initially evidenced by those cases involving claims for lost baggage and damaged goods. In such cases, the Warsaw Convention directs its reader to Articles 18 and 24(1). These provisions state, in pertinent part, as follows:

> *Article 18*: (1). The carrier shall be liable for damage sustained in the event of the destruction or loss

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[14] The United States Supreme Court has not expressly decided this question. *See, Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. ——, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989).

[15] The Court recognizes that its opinion today is contrary to the holding reached by Chief Judge King in *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986). However, having thoroughly considered the reasoning employed in *Rhymes* the Court must respectfully disagree and reach a contrary conclusion.

of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

. . . .

Article 24: (1). In the cases covered by articles 18 . . . . any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.[16]

. . . .

Upon consideration of the foregoing provisions, courts have unanimously held that the Warsaw Convention *provides the exclusive cause of action* in lost baggage and damaged goods cases. *See e.g., Jahanger v. Purolator Sky Courier*, 615 F.Supp. 29 (D.C. Pa. 1985); *Rucumar Inc. v. KLM Royal Dutch Airlines*, 608 F.Supp. 795, 797-98 (D.C.N.Y. 1985) ("The exclusivity of the Warsaw Convention to any claim for damages arising out of international transportation is established in Article 24 of the Convention"); *Stanford v. Kuwait Airlines Corp.*, 705 F.Supp. 142-143 (S.D.N.Y. 1989) ("The terms of the Warsaw Convention exclusively govern the rights and liabilities of the parties . . . ."). In particular, the Eleventh Circuit has stated that "[t]he Warsaw Convention creates the cause of action . . . . . and is the exclusive remedy against international air carriers for lost or destroyed cargo." *St. Paul Ins. Co. v. Venezuelan Intern. Airways*, 807 F.2d 1543 (11th Cir. 1987). Having so stated, the question then becomes whether this exclusivity finding should extend to personal injury and death cases.

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[16] In order to ensure uniformity of interpretation, which was one of the paramount objectives of the Convention, the text of the Warsaw Convention was "drawn up in French in a single copy," *Article 36*. The English version used here was originally published in a Treaty Information Bulletin of the Department of State in March 1934. 78 *Cong. Rec.* #115 77-82 (1934).

Such cases are governed by Articles 17 and 24(2) of the Warsaw Convention.[17] The majority of courts to address this issue have found the cause of action prescribed under the Warsaw Convention to be exclusive in such cases.[18] *See, Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3rd Cir. 1984) (court indicated that it would hold the Convention to be the exclusive basis for recovery), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985); *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984); *Benjamins v. British European Airways*, 572 F.2d at 919 ("[T]he desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action"). In this regard, the court in *In Re Air Crash Disaster At Warsaw, Poland, Etc.*, stated the following:

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[17] These Articles provide as follows:

Article 17: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 24(2): "In the cases covered by article 17 the provisions of the preceding paragraph [Article 24(1)] shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

[18] The Eleventh Circuit Court of Appeals has not expressly decided this issue. However, in *Floyd v. Eastern Airlines, Inc.*, the Court did provide a degree of insight to this question when construing *Burnett v. Trans World Airlines, Inc.*, a psychic injury case it stated:

"[T]he plaintiffs' action in *Burnett* was founded on state law, . . . not on the Warsaw Convention itself, which also places its conclusion on somewhat uncertain footing."

Floyd v. Eastern Airlines, Inc., 872 F.2d at 1477.

> "[T]he Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation, and plaintiffs cannot maintain a separate wrongful death action for damages under [state] law."

In Re Air Crash Disaster At Warsaw, Poland, Etc., 535 F.Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2nd Cir.). In so holding, these courts have emphasized the Convention's overriding concern for uniformity and the avoidance of overwhelming chaos that would otherwise result.

Given this concern for uniformity, it would make little sense to hold that the Convention allows separate state law causes of action to supersede its exclusivity. In this country alone, such a holding would expose air carriers to fifty (50) separate and distinct causes of action for wrongful death. Obviously, such a result would fatally impair the Convention's ability to provide for both the *substantive and procedural* uniformity envisioned by its drafters. In addition, a holding that abandons the primary objective of uniformity would undoubtedly open the floodgate to both plaintiff forum shopping and inconsistent verdicts. Such devistating consequences would not only serve to ignore but would ultimately destroy the intent of the Convention's drafters.

(D). Jurisdiction Over The Warsaw Convention

Although the Court concludes today that the Warsaw Convention creates the exclusive cause of action in wrongful death cases, we recognize that there exists concurrent jurisdiction. A plaintiff may file an action brought pursuant to the Warsaw Convention in either federal or state court. *See e.g., Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990); *Schmoldt Importing Company v. Pan American World Airways, Inc.*, 767 P.2d 411 (Ok. 1989); *Maro v. Aerolineas Argentinas*, 535 N.Y.S.2d 982

(N.Y. App. Div. 1988); *Arkin v. New York Helicopter Corp.*, 21 Avi. 17, 679 (N.Y. S.Ct. 1988); *Nahm SCAC Transport, Inc.*, 522 N.E.2d 531 (Ill. App. Ct. 1988); *Newsome v. Trans International Airways*, 492 So. 2d 592 (Ala. 1986). However, should the plaintiff choose to file his action in state court, the option of removal then becomes available to the defendant.

III. CONCLUSION

The rapid evolution of air travel has provided a unique ability to quickly transcend national boundaries and the laws which pertain therein. Such a reality necessitates the existence of uniform regulation. To hold otherwise would remove the cause of action available to the international traveler from the rule of reason to the realm of mere fortuity. Accordingly, based upon the foregoing analysis and the authorities cited therein, it is hereby ORDERED and ADJUDGED as follows:

1. The Motion For Remand filed in each of the above-styled actions is DENIED. The Court finds that these actions are properly removed.
2. The Court is of the opinion that this decision involves controlling questions of law as to which there is ground for a difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation within the meaning of 28 U.S.C. 1292(b).[19]

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[19] This statutory provision states in pertinent part as follows: *Section 1292. Interlocutory decisions*:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such ac-

Therefore, the issues decided herein are certified for interlocutory appeal.

3. Proceedings in this Court are stayed for ten (10) days. Either before or at that time, plaintiff shall advise the Court whether it will appeal.

DONE and ORDERED in Chambers, at Miami, Florida, this 28th day of August, 1990.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

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tion may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.